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### The Elder Law Symposium Edition

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# THE ELDER LAW SYMPOSIUM EDITION

ELIZABETH BARKER BRANDT\*

As the American population ages,<sup>1</sup> legal issues unique to older persons proliferate. This proliferation has led to the emergence of a new area of legal specialization – elder law. The growth in this area of specialization testifies to the burgeoning number of legal issues affecting older Americans. The American Bar Association first formed its Commission to Address Legal Problems of the Elderly in 1978.<sup>2</sup> The National Academy of Elder Law Attorneys was first organized in 1987.<sup>3</sup> As the population of older Americans increases, however, the demand for specialized services continues to grow. A small article in the February 29, 2000 issue of the Topeka Capitol-Journal, for example, announced the first meeting of the Kansas chapter of the National Academy of Elder Law Attorneys.<sup>4</sup>

Many attorneys view elder law as the province of the estate planning bar. And, in fact, estate planners most often end up expanding their practices to encompass elder care issues. But many of the issues elder law attorneys deal with are outside the traditional gamut of estate planning. Elder law encompasses topics as diverse as bankruptcy, health care, age discrimination, guardianship, financial, physical, and mental abuse of the elderly, retirement planning, and health care. The area includes such controversial topics as death and dying and the use of medical directive to control health care. The breadth of issues arising in the area of elder law is attested to by the topics of this symposium.

Carolyn Dessin's article outlines the pressing need for law reform in the area of financial abuse of the elderly.<sup>5</sup> Dessin points out that the problem of financial abuse has gone largely unaddressed because it has been overshadowed by concerns about physical and mental abuse, and because of the difficulty of defining what conduct consti-

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1. Since 1990, the population of older Americans has increased by 10.1% compared to the 8.2% growth in the number of Americans under the age of 65. Although the growth in the population of older Americans is expected to slow in the near future, it will burgeon between 2010 and 2030 as "baby boomers" reach age 65. By 2030, 70 million Americans will be over the age of 65 – more than twice the current population of older Americans. See AARP, A PROFILE OF OLDER AMERICANS (1999) available at <<http://research.aarp.org/general/profile99.pdf>>.

2. See ABA Commission on Legal Problems of the Elderly (visited Mar. 17, 2000) <<http://www.abanet.org/elderly>>.

3. See National Academy of Elder Law Attorneys (visited Mar. 17, 2000) <<http://www.naela.com>>.

4. See Briefly in Topeka, TOPEKA CAPITOL-JOURNAL, Feb. 29, 2000, available in LEXIS, News Library, News Group file.

5. See Carolyn Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000).

tutes financial abuse of the elderly. She outlines the problems associated with defining and regulating elder abuse, proposes a definition of elder abuse, and advocates the creation of a state funded office to investigate and police allegations of elder abuse.

In a related area, Robyn Meadows writes about the sometimes invisible problems of bankruptcy for elderly Americans.<sup>6</sup> In an era where many elderly people are enjoying economic security, Meadows focuses on the severe economic dislocation suffered by some elderly Americans. Meadows article especially illustrates the problems confronted by attorneys practicing in the area of elder law. The Bankruptcy reforms she discusses, using means-testing to shift more consumer bankruptcies from Chapter 7 liquidation plans to Chapter 13 wage-earner repayment plans, will be especially harsh for older persons filing for bankruptcy. Meadows suggests adjustments to the means-testing reforms to account for future disruptions in the income of the bankrupt person.

Michael Wytychak's article delineates the manner by which some seniors are provided with long-term care by presenting a detailed survey of the Medicaid program and its role in the payment of nursing home expenses in Idaho.<sup>7</sup> For older persons of limited financial resources, Medicaid has been the cause of considerable anxiety. This stems primarily from a lack of information about the Medicaid program and from the numerous fictions that surround the estate recovery process used to recoup nursing home expenses from the assets of a Medicaid recipient. Wytychak's article offers valuable guidance with regard to the payment of nursing home bills through Medicaid in two key areas. First, he explains how persons in need of long-term care can qualify to receive Medicaid benefits in light of the complex application process and eligibility requirements. Next, he demonstrates how attorneys can dispel the common misconceptions about the effect that Medicaid has on a person's family members and personal assets.

Paul Clark's examination of the revisions to Idaho's guardianship statute takes the symposium in a somewhat different direction.<sup>8</sup> Although guardianships of elderly persons are often sought by relatives as a means of managing the individual's finances, they raise unique issues regarding incapacity and protection of the interests of the elderly person. Clark analyzes the recent amendments to the law and

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6. See Robyn L. Meadows, *Bankruptcy Reform and the Elderly: The Effect of Means Testing on Older Debtors*, 36 IDAHO L. REV. 227 (2000).

7. See Michael Wytychak III, *Payment of Nursing Home Bills Through the Medicaid Program*, 36 IDAHO L. REV. 243 (2000).

8. See Paul L. Clark, Comment, *"What Will We Do With Dad?" Guardianship in Idaho and its Implications for the Elderly*, 36 IDAHO L. REV. 269 (2000).

argues that while they are helpful, they do not go far enough in protecting the interests of the incapacitated person.

Taking the symposium in yet another direction, Brett Johnson examines current developments in the area of age discrimination in employment.<sup>9</sup> Johnson's article documents an ongoing problem suffered by older Americans – job instability at the end of their careers created because of age discrimination. He argues that the courts should interpret the scope of the Age Discrimination in Employment Act as broadly as they have interpreted Title VII.

Finally Carsten Peterson, taking the symposium into an examination of health care issues, writes about the intersection between Medicare reform and genetic discrimination.<sup>10</sup> Peterson advocates that Medicare laws and regulations be reformed to protect older Americans from genetic discrimination by providers of supplemental Medicare policies and managed care plans. Without such protection, the availability of health care coverage for many older Americans will be jeopardized just as scientific research provides a genetic link and the promise of treatment for increasing numbers of disorders.

As the breadth of articles in this symposium indicates, there is a need for informed research on and legal representation of the unique interests of older Americans. Whether those issues arise in areas directly affecting older persons such as providing protection against elder financial abuse, or whether they arise because the laws of general application affect older persons differently than younger persons, as in the bankruptcy reform area, attention is needed. This symposium attempts to survey some of the emerging issues in the field.

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9. See Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing the ADEA from Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000).

10. See Carsten A. Peterson, Comment, *New Twist to an Old Injustice – Genetic Discrimination and Medicare Reform*, 36 IDAHO L. REV. 345 (2000).